

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION**

CTB, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 7:14-CV-157-D
)	
HOG SLAT, INCORPORATED)	
)	
Defendant.)	

**DEFENDANT HOG SLAT, INC’S
MOTION FOR SUMMARY JUDGEMENT**

Pursuant to Fed. R. Civ. P. 56 and L.R. 56.1, Defendant Hog Slat, Inc. (“Hog Slat”), through counsel, respectfully moves this Court for summary judgment as to all claims filed by Plaintiff CTB, Inc. (“CTB”). In support of its Motion, Hog Slat relies on its Memorandum of Law, and its Statement of Undisputed Material Facts and Appendix thereto, filed contemporaneously herewith. In further support of its Motion, Hog Slat states as follows:

1. On July 30, 2014, CTB filed its corrected Complaint alleging infringement of registered trademarks under 15 U.S.C. § 1114, unfair competition under 15 U.S.C. § 1125(a), unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 *et seq.* (“UDTPA”), and common law trademark infringement and unfair competition. (D.E. 3 at ¶¶43–78.)

2. On Sept. 23, 2014, Hog Slat timely filed its Answer and Counterclaims denying the substance of CTB’s claims and seeking (1) dismissal of CTB’s Complaint with prejudice, (2) judgment in favor of Hog Slat and against CTB on each of CTB’s claims, (3) cancellation of CTB’s trade dress registrations, (4) an award of pre-judgment and post-judgment interest and

attorney's fees to Hog Slat, and (5) costs of suit and other relief as the Court may deem just and proper. (D.E. 12 at pp. 9–27.)

3. The Parties then commenced discovery and subsequent motion practice which ultimately resulted in Magistrate Judge Gate's March 23, 2016 Order granting certain relief to Hog Slat in response to Hog Slat's Motion for Spoliation Sanctions (D.E. 31) and Motion to Compel (D.E. 34), including an award of attorneys fee and inferences adverse to CTB. (D.E. 74.)

4. CTB objected and appealed Judge Gate's Order. (D.E. 88.) Following a Hearing, the Court issued its October 24, 2016 Order overruling CTB's objections and appeal, extending discovery until December 2, 2016 for the taking of limited additional depositions by Hog Slat, and setting January 20, 2017 as the deadline for filing dispositive motions. (D.E. 114). This Motion is therefore timely. (*Id.*)

5. To sustain its claims, CTB must establish that its Asserted Trade Dress is valid and protectable, and that Hog Slat's sale of its products is likely to create consumer confusion. 15 U.S.C. §§ 1114(a); 1125(a)(1)(A); *Ashley Furniture Indus., Inc. v. SanGiacomo N.A. Ltd.*, 187 F.3d 363, 368 (4th Cir. 1999) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992)). For its UDTPA claim, CTB must also establish that Hog Slat engaged in conduct in or affecting commerce, that the conduct was unfair or had the tendency to deceive, and that CTB suffered actual injury as a proximate result of Hog Slat's deceptive acts or statements. N.C. Gen. Stat. § 75-1.1, *et. seq.*

6. Defendant Hog Slat moves for summary judgment as there are no genuine issues of fact that Plaintiff CTB's Asserted Trade Dress, which forms the basis for each of its claims, is invalid for being impermissibly functional and lacking the required secondary meaning. 15 U.S.C. § 1052(e)(5); *see also* 15 U.S.C. §§ 1114, 1115(b)(8); *TrafFix Devices, Inc. v. Mktg.*

Displays, Inc., 532 U.S. 23, 34–35 (2001); *Ashley Furniture*, 187 F.3d at 369; *George & Co. LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 393–94 (4th Cir. 2009).

7. If the either or both of the Product Configuration Trade Dress or Color Trade Dress are functional or otherwise invalid (e.g., for lack of secondary meaning), cancellation of the affected Registration is appropriate. 15 U.S.C. § 1119; *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 155 (4th Cir. 2014).

8. Defendant Hog Slat further moves for summary judgment because CTB cannot establish that there are genuine issues of fact as to a likelihood of confusion between the parties' products incorporating the Asserted Trade Dress. 15 U.S.C. § 1114; *Ashley Furniture*, 187 F.3d at 368.

9. The invalidity of the Asserted Trade Dress and absence of any likelihood of confusion (i.e. no deception of the public), along with the absence of any evidence showing that Hog Slat's actions directly or proximately caused CTB any harm, further establishes that Defendant Hog Slat committed no unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, *et seq.*; *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987).

WHEREFORE, Defendants respectfully request that the Court enter an Order granting Defendant Hog Slat's Motion and dismissing all of Plaintiff CTB's claims as a matter of law.

Dated: January 20, 2017

Respectfully Submitted,

WILLIAMS MULLEN

By: /s/ Robert C. Van Arnam

Robert C. Van Arnam

N.C. Bar # 28838

Andrew R. Shores

N.C. Bar # 46600

P.O. Drawer 1000

Raleigh, NC 27602-1000

Telephone: (919) 981-4000

Fax: (919) 981-4300

rvanarnam@williamsmullen.com

ashores@williamsmullen.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of electronic filing to the following counsel of record for Plaintiff:

David J. Marr (Ill. Bar No. 6194750)
Eric Dorkin (Ill. Bar No. 6256390)
150 North Michigan Avenue
Suite 2700
Chicago, Illinois 60601
dmarr@clarkhill.com
edorkin@clarkhill.com

Christopher B. Clare (N.C. Bar No. 39582)
601 Pennsylvania Avenue NW
North Building, Suite 1000
Washington, D.C. 20004
Email: cclare@clarkhill.com
Local Civil Rule 83.1 Counsel

Attorneys for Plaintiff, CTB, Inc.

WILLIAMS MULLEN

/s/ Robert C. Van Arnam
Robert C. Van Arnam
N.C. Bar # 28838
Andrew R. Shores
N.C. Bar # 46600
P.O. Drawer 1000
Raleigh, NC 27602-1000
Telephone: (919) 981-4000
Fax: (919) 981-4300
rvanarnam@williamsmullen.com
ashores@williamsmullen.com

Attorneys for Defendants